

No. 77-1104

Supreme Court, U. S.

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MICHAEL RODAK JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

MONROE COUNTY CONSERVATION COUNCIL, INC.,
PETITIONERS

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE SECRETARY OF TRANSPORTATION
IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-31 is reported at 566 F. 2d 419. The opinion of the district court (Pet. App. B-1 to B-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1977. The petition for writ of certiorari was filed on February 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Environmental Impact Statement prepared in connection with construction of the final segment of a perimeter highway around Rochester, New York, satisfied the requirements of the National Environmental Policy Act.
2. Whether the proposed construction of the highway segment violated Section 4(f) of the Department of Transportation Act.

STATEMENT

This case concerns the proposed construction of the final four-mile segment of the "Outer Loop" highway encircling the city of Rochester, New York. The Outer Loop highway system was proposed after years of planning by state, county, and city officials in an attempt to solve the serious traffic problems of Rochester and its adjoining towns. The Outer Loop now encircles the city except for a four-mile gap in the southwest portion of the perimeter, where the Genesee Valley Park is located. In 1968, the Bureau of Public Roads (now the Federal Highway Administration) approved a proposal to complete the Outer Loop by constructing a 2100-foot elevated viaduct over a small portion of the park (Pet. App. A-3 to A-4).

In 1971, petitioners filed suit to enjoin construction of that segment of the Outer Loop. They contended that the federal approval for the construction had failed to comply with various federal statutes, including the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*; Section 4(f) of the Department of Transportation Act of 1966 (DOTA), 82 Stat. 824, as amended, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138; and Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 401. The district court denied relief (Pet. App.

D), but the court of appeals, in 1972, reversed. The court of appeals directed the Secretary of Transportation not to approve funding for the remaining portion of the Outer Loop until the Secretary was satisfied that the requirements of NEPA had been met, that there was no feasible and prudent alternative to taking the parkland, and that all possible planning had been done to minimize harm to the park. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F. 2d 693 (C.A. 2).¹

In compliance with the court of appeals' mandate, the Secretary of Transportation solicited comments from interested public and private agencies and held public hearings on the proposal to complete the Outer Loop. Five years later, after the preparation of a 395-page Environmental Impact Statement and an 81-page statement pursuant to Section 4(f) of DOTA, the Secretary gave final approval to the proposal. The district court, finding that the Secretary had complied with the mandate of the court of appeals, granted the Secretary's motion to vacate the injunction (Pet. App. B-1 to B-4).²

Petitioners again sought review in the court of appeals, claiming that the Secretary had still failed to comply with NEPA and DOTA. Petitioners contended that the two statements were inadequate because they failed to explore certain alternatives to the recommended action and

¹The court of appeals also required that, as a prerequisite to the commitment of federal funds, the State hold a hearing and file a report as required by the Federal-Aid Highway Act, and that the State obtain a permit to build a bridge over the Genesee River as required by the Rivers and Harbors Act of 1899. Each of these requirements has been met (Pet. App. A-6, A-28).

²The court's order was made subject to receipt of the necessary Coast Guard permits (33 U.S.C. 401), which were granted shortly after the district court's decision (Pet. App. A-28).

because they did not adequately discuss the social impact of the proposed construction. The court of appeals unanimously affirmed the district court's order dissolving the injunction (Pet. App. A-1 to A-31).

The court noted that the Secretary of Transportation had considered thirteen alternatives to the recommended proposal before he authorized funding for the completion of the highway over the park. After analyzing the alternatives discussed in the statements, the court concluded that the NEPA and DOTA statements had adequately surveyed the alternatives and that there was ample basis for the Secretary's determination that there were no feasible and prudent alternatives to the proposal he approved (Pet. App. A-21 to A-22). In addition, the court observed that the proposal included plans to build recreational trailways, boat ramps, and pedestrian access routes around the construction, and that major steps would be taken to prevent air, water, and noise pollution. The court thus held that the Secretary had taken sufficient steps to minimize harm to the park (Pet. App. A-24 to A-25).

Finally, the court of appeals concluded that adequate consideration had been given to the social impact of the proposed construction. As the court noted, the environmental impact statement had found that the proposal would not isolate any neighborhood, displace any residential, commercial, or industrial uses, or adversely affect any minority group (Pet. App. A-24). According to the EIS, the impact on the park itself would also be minimal. When the city had first determined to build the highway, it had acquired 27 additional acres of land to replace the park land that the highway would occupy. Under the recommended proposal, only 10.7 acres would be required for the viaduct, and 5.3 acres

beneath the viaduct would be returned to park usage after the construction was completed. Vehicular and pedestrian traffic through the park would not be affected, nor would any of the park's recreational facilities. The section of the park surrounding the viaduct would be converted into an active recreational area (Pet. App. A-24 to A-25).

ARGUMENT

This case presents no issue warranting review by this Court. The court of appeals applied well-settled principles governing the standard for reviewing the adequacy of NEPA and DOTA statements. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402; *Coalition for Responsible Regional Development v. Coleman*, 555 F. 2d 398 (C.A. 4); *Brooks v. Coleman*, 518 F. 2d 17 (C.A. 9); *Finish Allatoona's Interstate Right, Inc. v. Brinegar*, 484 F. 2d 638 (C.A. 5). The court's decision is not in conflict with any decision of this Court or of any court of appeals.

1. Petitioners first contend (Pet. 21-27) that the Secretary did not give adequate consideration to the social impact of the proposed construction. This failure, they claim, violated the Department of Transportation regulation that requires an EIS to include "a discussion of the significant social impacts anticipated to be caused by the proposed action." 23 C.F.R. 771.18(i)(2)(iii). Petitioners suggest that the portion of the EIS devoted to social impacts should have been more thorough, and that the Secretary was wrong in concluding that the social impact of the construction was insignificant.

Contrary to this contention, a substantial portion of the Statement was devoted to the probable social impact of the construction, and the Secretary's conclusion that it would have no significant impact was based on consideration of a variety of factors. Neither NEPA nor the

Department of Transportation's regulations require the Secretary to follow any particular practices or procedures in preparing an EIS, such as conducting a formal sociological study. They require only that there be "[sufficient] information as appears to be reasonably necessary under the circumstances for evaluation of the project." *New York v. Kleppe*, 429 U.S. 1307, 1311 (Marshall, J., in chambers). The court of appeals properly limited its review to determining that the Environmental Impact Statement contained a sufficiently thorough discussion of social consequences to permit an intelligent and informed judgment about the effect of the project on surrounding neighborhoods and park users. The court properly declined petitioners' invitation to make "a de novo determination concerning the advisability of the proposed construction" (Pet. App. A-26).

2. Nor were the Secretary's statements deficient (see Pet. 27-38) for failing to include alternative routes that petitioners consider preferable. As the court of appeals concluded from its analysis of the 13 alternatives explored in the EIS, the Secretary properly determined that all the other choices were either not feasible or not prudent (Pet. App. A-9 to A-22). Applying the guidelines established by this Court in *Overton Park, supra*, 401 U.S. at 416, the court of appeals noted each of the "relevant factors" and "unique problems" presented by the other alternatives that the Secretary considered.⁴ In sum, the statements

⁴Petitioners argue that the decision of the court of appeals conflicts with this Court's decision in *Overton Park* (Pet. 27-35), but in fact the court of appeals specifically applied the *Overton Park* standards throughout its analysis. Petitioners' real claim appears to be that the court misapplied the principles of *Overton Park* to the facts of this case, a claim which, even if valid, would not merit this Court's review.

constituted "a reasonably comprehensive selection of alternatives, made in good faith" (Pet. App. A-21).⁵

An agency is not obligated to explore in detail every variation of the alternatives before it; it is required only to set forth those alternatives necessary to the making of a reasoned choice. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, Nos. 76-419 and 76-528, decided April 3, 1978, slip op. 28-29; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21; *Manygoats v. Kleppe*, 558 F. 2d 556, 559-560 (C.A. 10); *Coalition for Responsible Regional Development v. Coleman, supra*, 555 F. 2d at 400; *Brooks v. Coleman, supra*, 518 F. 2d at 19; *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F. 2d 1021 (C.A. 4), certiorari denied *sub nom. Interstate 95 Commission v. Coleman*, 423 U.S. 912. In this case, the EIS explored the various alternatives in sufficient detail to provide an ample basis for a reasoned choice.⁶

⁵Petitioners also contend that this case conflicts with the decision of another panel of the same circuit, in which the court held that the proper test for judicial review was whether the EIS was compiled in good faith and would permit a decisionmaker fully to consider and balance the environmental factors (Pet. 35-38). Yet the court below quoted and specifically followed that language from the earlier opinion. See Pet. App. A-7, quoting from *County of Suffolk v. Secretary of the Interior*, 562 F. 2d 1368, 1375 (C.A. 2), certiorari denied, No. 77-685, February 21, 1978. In any event, an intra-circuit conflict is to be resolved by the court of appeals, not this Court. cf. *Wisniewski v. United States*, 353 U.S. 901.

⁶Petitioners suggest that the Secretary improperly failed to consider an "obvious" route around the southern border of the park (Pet. 33-34). The EIS, however, specifically addressed the possibility of a southern route around the park and reported that a study done by a private concern had reached the conclusion that the southern route would be so long and circuitous that motorists would not use it (Pet. App. A-28 to A-29).

3. Finally, petitioners contend (Pet. 38-44) that the district court acted with unseemly haste and insufficient deliberation in deciding to dissolve the injunction. Whatever the merits of this claim, the careful consideration given the case by the court of appeals cured any inadequacy in the district court's review. The facts were undisputed and were established almost entirely through documents. Therefore, as the court of appeals recognized (Pet. App. A-29 to A-31), that court was in as good a position as the district court to determine what could reasonably have been expected from the EIS and the Section 4(f) Statement. See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 141, n. 16; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-396; *County of Suffolk v. Secretary of the Interior*, 562 F. 2d 1368, 1375 (C.A. 2), certiorari denied, No. 77-685, February 21, 1978.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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